79-1989

No.

Supreme Court, U. S.
FILED
JUN 17 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

CITIZENS PARTY, BARRY COMMONER, LADONNA HARRIS, PAUL BECKER, JUDITH TRANSUE, 1980 WEST VIRGINIA SOCIALIST WORKERS CAMPAIGN COMMITTEE, TOM MORIARTY,

Appellants,

v.

A. JAMES MANCHIN, Secretary of State, State of West Virginia

Appellee,

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

ROBERT M. BASTRESS, JR.
P. O. Box 1295
Morgantown, WV 26505
Counsel for Appellants

Of Counsel:

MARGARET WINTER
New York, NY

RICHARD MAYBERRY
Washington, D.C.

CHARLES R. DISALVO
Morgantown, WV

June 13, 1980

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... *i*

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

QUESTIONS PRESENTED 3

STATEMENT OF THE CASE 4

A. Parties 4

B. Facts 4

C. Proceedings Below 6

D. Raising the Federal Question 7

THE FEDERAL QUESTIONS ARE SUBSTANTIAL 8

I. To Adequately Remedy the Effects of the Magisterial District and Filing Fee Restrictions Found Unconstitutional by the West Virginia Supreme Court of Appeals, Appellants Must Be Allowed an Extension of Time in Which to Solicit Signaures 8

II. WEST VIRGINIA CODE § 3-5-23's Disenfranchisement from the Primary Election of Those Voters Who Sign Third Party Nominating Certificates Creates an Unreasonable Burden on Appellants' Rights to Ballot Access and Thus Violates the First Amendment and the Equal Protection Clause 13

III. The § 3-5-23 Requirement that Filing Fees Must Be Paid Before a Third Party Can Solicit Nominating Signatures Creates an Unnecessary and Unreasonable Burden on Appellants' Rights of Ballot Access 18

IV. The First Amendment Voids the § 3-5-23 Requirements that Canvassers for Signatures on Third Party Nominating Certificates Must First Receive Credentials from County Clerks and

Page

Must Identify Themselves to Each Voter Solicited 20

A. The Credential Requirement Is an Unconstitutional Licensing Scheme 20

B. Section 3-5-23 Impermissibly Imposes Upon the Free Speech Anonymity Required by the First Amendment 24

V. The West Virginia Legislature Has Purposefully and Effectively Designed §§ 3-5-8, -23, and -24 to Keep Third Parties Off the Ballot 26

THE FEDERAL QUESTIONS ARE IMPORTANT 28

CONCLUSION 31

APPENDICES:

A. Order, West Virginia Supreme Court of Appeals, May 22, 1980 . . . . . 1a

B. Notice of Appeal, Filed in West Virginia Supreme Court of Appeals, June 4, 1980 . . . . . 4a

C. Statutes:

West Virginia Code § 3-5-8 . . . . . 7a

West Virginia Code § 3-5-23 . . . . . 9a

West Virginia Code § 3-5-24 . . . . . 14a

TABLE OF AUTHORITIES

Cases: *Page*

American Party of Texas v. White, 415 U.S. 767 (1974) 12, 13, 15

Bates v. Little Rock, 361 U.S. 516 (1960) 28

Buckley v. Valeo, 424 U.S. 1 (1976) 25

Bullock v. Carter, 405 U.S. 134 (1972) 10, 18

Cantwell v. Connecticut, 310 U.S. 296 (1940) 20, 22

Carrington v. Rash, 380 U.S. 89 (1965) 14

Cipriano v. City of Houma, 395 U.S. 701 (1968) 14

Page

Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974) 28

Dunn v. Blumstein, 405 U.S. 330 (1972) 14, 16

Duncantell v. City of Houston, 333 F. Supp. 973 (S.D. Tex. 1971) 19

Evans v. Cornman, 398 U.S. 419 (1970) 14

Fishman v. Shaffer, 429 U.S. 1325 (1976) 9

Grayned v. City of Rockford, 408 U.S. 104 (1972) 22

Hague v. C.I.O., 307 U.S. 496 (1939) 20

Hynes v. Mayor of Oradell, 425 U.S. 610 (1976) 21, 22, 23, 24, 25

Illinois Board of Elections v. Socialists Workers Party, 441 U.S. 173 (1979) 10, 15, 16

Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1968) 14

Kusper v. Pontikes, 414 U.S. 51 (1973) 16

Largent v. Texas, 318 U.S. 418 (1943) 20

Lovell v. Griffin, 303 U.S. 444 (1938) 20, 22

Lubin v. Panish, 415 U.S. 709 (1974) 10, 19

MacBride v. Exon, 558 F.2d 443 (8th Cir. 1977) 15, 30

McCarthy v. Briscoe, 429 U.S. 1319 (1976) 8, 12, 17

NAACP v. Button, 371 U.S. 415 (1963) 23

Paton v. LaPrade, 524 F.2d 862 (3d Cir. 1975) 25

Phoenix v. Kolodziejski, 399 U.S. 204 (1970) 14

Reynolds v. Sims, 377 U.S. 533 (1964) 28

Salyer Land Co. v. Tulare Lake Water Basin Dist., 410 U.S. 719 (1973) 14

Schneider v. State, 308 U.S. 147 (1939) 20, 22

Shelton v. Tucker, 364 U.S. 479 (1960) 28

Shuttlesworth v. Birmingham, 394 U.S. 417 (1969) 20

Socialist Workers Party v. Attorney General of the United States, 510 F.2d 253 (2d Cir. 1974) 25

Page

Southeastern Productions, Ltd. v. Conrad, 420 U.S. 546 (1975) 20

Staub v. City of Baxley, 355 U.S. 313 (1958) 20, 22

Storer v. Brown, 415 U.S. 724 (1974) 16, 17, 27

Sweezy v. New Hampshire, 354 U.S. 234 (1957) 29

Talley v. California, 362 U.S. 60 (1960) 24

Wesberry v. Saunders, 376 U.S. 1 (1964) 28

Wisconsin Socialists Workers 1976 Campaign Comm. v. McCann, 422 F. Supp. 540 (E.D. Wis. 1977) 25

Williams v. Rhodes, 393 U.S. 21 (1968) 15, 16, 28, 29

Williams v. Rhodes, 89 S. Ct. 1 (1968) 9, 12, 17

Statutory and Constitutional Provisions:

United States Constitution, First Amendment . . . . . *passim*

United States Constitution, Fourteenth Amendment, Equal Protection Clause . . . . . *passim*

West 3, 4, 20, 26

West Virginia Code, § 3-5-23 . . . . . *passim*

West Virginia Code, § 3-5-24 . . . . . *passim*

Barnes West Virginia Code, Ch. 3, Sec. 39 26

1923 Acts of the (W. Va.) Legislature, Ch. 23, Sec. 3 26

1915 Acts of the (W. Va.) Legislature, Ch. 26, Sec. 23 26

Miscellaneous:

Congressional Quarterly Guide to United States Elections (1975) & 1976 Supp. 6

N. Dorsen, P. Bender, & B. Neuborne, Political and Civil Rights in the United States (1976) 23

Secretary of State (W. Va.), Official Returns of the Election 5

Page

West Virginia Blue Book 10

Note, *The Less Restrictive Alternative Principle in Constitutional Adjudication*, 27 VAND. L. REV. 971 (1974) 16

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

CITIZENS PARTY, BARRY COMMONER, LADONNA HARRIS, PAUL BECKER, JUDITH TRANSUE, 1980 WEST VIRGINIA SOCIALIST WORKERS CAMPAIGN COMMITTEE, TOM MORIARTY,

Appellants,

v.

A. JAMES MANCHIN, Secretary of State, State of West Virginia

Appellee,

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

The appellants are political parties, candidates, and voters who seek to have certain third party candidates placed on the November, 1980, general election ballot in West Virginia. They appeal from portions of a final judgment of the West Virginia Supreme Court of Appeals holding that certain provisions of the state's law regulating access to the ballot do not exceed first and fourteenth amendment limits.

OPINION BELOW

The West Virginia Supreme Court of Appeals has not yet issued an opinion. On May 22, 1980, the Court issued a dispositive order, which appears in the accompanying Appendix, and stated that an opinion would be published at a later date.

JURISDICTION

Appellants brought this action, *sub nom. West Virginia Libertarian Party, et al. v. Manchin,* as a Petition for Mandamus under the original jurisdiction of the West Virginia Supreme Court of Appeals. W.VA. R. APP. PRO., Rule 14. That Court heard oral argument and decided the matter on the pleadings, with supplementary affidavits, on May 22, 1980. A Motion to Amend was denied on May 27, 1980. A Notice of Appeal was filed with the Supreme Court of Appeals on June 4, 1980.

The West Virginia Supreme Court's judgment invalidated certain portions of W.Va. Code §§ 3-5-23 to -24 and sustained others. Appellants now appeal those aspects of the state court's order upholding provisions of the statute drawn into question. This Court therefore has jurisdiction to hear this appeal under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, First Amendment

Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, ...

United States Constitution, Fourteenth Amendment, Equal Protection Clause

No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

West Virginia Code, Sections 3-5-8, 3-5-23, and 3-5-24

(Vol. 2, W.VA. CODE at 189-90, 207-10)

See Appendix.

QUESTIONS PRESENTED

1. Whether the West Virginia Supreme Court of Appeals erred in not extending the time for solicitation of signatures on third party nominating certificates to remedy the effects of those provisions of W.VA. CODE §§ 3-5-8 and 3-5-23 found by that Court to be unconstitutional burdens on the appellants' rights of ballot access.

2. Whether the first amendment and the equal protection clause invalidate, as an unreasonable burden on appellants' rights of ballot access, W.VA. CODE § 3-5-23's disenfranchisement for the primary election of voters who have signed third party nominating certificates.

3. Whether the requirement in W.VA. CODE § 3-5-23 that third party candidates must pay a sizeable filing fee before they can solicit nominating signatures creates an unnecessary and unreasonable burden on the right of ballot access.

4. Whether the first amendment voids, as an unconstitutional licensing scheme and an unnecessary invasion of associational anonymity, those provisions of W.VA. CODE § 3-5-23 that require third party canvassers for

signatures on nominating certificates to secure credentials from a county clerk before they can solicit signatures and to identify themselves to all potential signators.

STATEMENT OF THE CASE

A. PARTIES

The Citizens Party is a national political party. Its candidates for President and Vice-President are, respectively, Barry Commoner and LaDonna Harris. Paul Becker and Judith Transue are West Virginia voters who are working to elect the Commoner-Harris ticket.

The 1980 West Virginia Socialist Workers Campaign Committee (WVSWCC) is a West Virginia organization working with the national Socialist Workers Party to elect Andrew Pulley and Matilda Zimmerman as President and Vice-President in 1980. The WVSWCC also seeks to elect appellant Tom Moriarty, a coal miner, as governor of West Virginia.

Appellee A. James Manchin is West Virginia's Secretary of State. As such, he has responsibility for administering the state's election laws.

B. FACTS

West Virginia Code §§ 3-5-8, -23, and -24 control third party and independent candidate access to the general election ballot. Under those provisions, a third party must, before all else, pay a filing fee to the respondent equivalent to one percent of the salary of the sought-for office. (That is, $2000 for the office of President and $500 for the office of Governor.) Section 3-5-23 then requires the party to secure signatures from registered voters in a number equal to or greater than one

percent of the total vote at the preceding general election for the desired office. That seemingly reasonable duty, however, is complicated to the point of near-impossibility by the following restrictions on signature gathering:

1) Every canvasser must first receive credentials from the county clerk of the county in which the canvasser lives;

2) A canvasser can solicit signatures only in the magisterial district in which he lives (invalidated by the West Virginia Supreme Court of Appeals);

3) A voter can sign the nominating certificate only in the magisterial district in which he lives (invalidated by the West Virginia Supreme Court of Appeals);

4) Any voter who signs a nominating certificate for any office loses his right to vote in the primary for all partisan offices (although the voter can sign any number of certificates for any office);

5) The certificates and signatures must be submitted to the appellee by the day before the primary;

6) There is no period after the primary for soliciting signatures.

This combination of restrictions has been deadly for third party and independent candidates in West Virginia. Since 1940 only two have qualified for the office of President on the state's general election ballot (Henry Wallace in 1948 and George Wallace in 1968). SECRETARY OF STATE (W.Va.), OFFICIAL RETURNS OF THE GENERAL ELECTION. No one has qualified for the ballot during the last forty years as a third party or independent candidate for United States Senator from West Virginia. *Id.* Among the forty-eight states who have participated

in all the federal elections since 1940, West Virginia ranks forty-eighth in qualifying third party candidates. CONGRESSIONAL QUARTERLY GUIDE TO UNITED STATES ELECTIONS (1975) and 1976 SUPPLEMENT.

Because neither the WVSWCC nor Tom Moriarty had any money to pay the filing fees, the Socialists were never able to begin canvassing for signatures. The Citizens Party was able to pay the fees for Mr. Commoner and Ms. Harris, but the magisterial district requirements and the primary vote forfeiture so burdened collection of the necessary signatures as to make qualification impossible.

On April 30, 1980, the WVSWCC therefore joined with the West Virginia Libertarian Party in a Petition for Mandamus within the original jurisdiction of the West Virginia Supreme Court of Appeals. The Citizens Party, its candidates, and two of their supporters subsequently intervened as petitioners, as did independent candidate John Anderson.

C. PROCEEDINGS BELOW

The appellants' mandamus petition challenged the filing fees, the magisterial district restrictions, the primary vote forfeiture, the pre-primary filing deadline without a post-primary canvassing period, and the credentials requirement. On May 6, 1980, the West Virginia Supreme Court of Appeals issued a show cause order to the appellee returnable on May 20th. Oral argument was held on that date. The case was argued and decided on the pleadings, as supplemented by several affidavits from the petitioners. On May 22, 1980, the West Virginia Court issued an order that invalidated the filing fees requirement as applied to indigents and struck

down the magisterial district restrictions. The Court sustained the primary vote forfeiture, the pre-primary deadline, and the credentials requirement. The appellants immediately filed a Motion to Amend the Order to allow a post-primary signature solicitation in order to remedy the effects of the unreasonably burdensome filing fees and magisterial district limitations. On May 27th, the court denied that motion.

D. RAISING THE FEDERAL QUESTION

The appellants' mandamus action was based entirely on federal and state constitutional claims. The Petition and Amended Petition filed with the West Virginia Supreme Court of Appeals asserted that the filing fees, the primary vote forfeiture, and the credentials requirement violated the first amendment and the equal protection clause of the United States Constitution. The Memorandum and the Brief filed in support of the petition articulated in detail just how those federal provisions were infringed by those state statutory provisions. Those arguments were also orally presented to the Supreme Court of Appeals on May 6 and May 20, 1980.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I.

TO ADEQUATELY REMEDY THE EFFECTS OF THE MAGISTERIAL DISTRICT AND FILING FEE RESTRICTIONS FOUND UNCONSTITUTIONAL BY THE WEST VIRGINIA SUPREME COURT OF APPEALS, APPELLANTS MUST BE ALLOWED AN EXTENSION OF TIME IN WHICH TO SOLICIT FOR SIGNATURES.

Even though the West Virginia Supreme Court of Appeals found the filing fees requirement (as applied to indigents) and the magisterial district limitations unconstitutional, that court nevertheless refused to extend the time for appellants to solicit signatures. The court's May 22nd order thus left only eleven days for the Citizens Party to gather signatures without the unconstitutional restrictions and for the Socialists to file their affidavits of indigency, secure credentials from the clerks, and then solicit signatures. That was just not an adequate period of time to compensate for the serious burdens placed on canvassing by § 3-5-23. By not providing appellants with a meaningful remedy for this year's campaign, the West Virginia Supreme Court failed to accord proper respect to appellants' constitutional rights.

Decisions from Justices of this Court, sitting as Circuit Justices, dictate that some affirmative relief be given the appellants for deprivations they suffered because of the filing fee and magisterial district restrictions. In *McCarthy v. Briscoe,* 429 U.S. 1319 (1976), Eugene McCarthy sought an order from Justice Powell requiring Texas to place the former senator's name on the general

election ballot. Both the district court and the Court of Appeals had agreed with McCarthy that Texas had unconstitutionally foreclosed him from ballot access. Both lower courts had also, however, denied him any relief, asserting that he was barred by laches. Justice Powell reversed and on September 30th ordered Texas to place McCarthy on the November ballot.

Justice Powell pointed to several features that called for relief. He observed, first, that the Texas statute in question was quite clearly unconstitutional and, second, that it was directly responsible for McCarthy's failure to qualify for the Texas ballot. 429 U.S. at 320-22. Third, Justice Powell took judicial notice that Senator McCarthy was a prominent political figure with the requisite community support and that the State thus had little, if any, interest in preventing his appearance on the ballot. Similarly, in *Williams v. Rhodes,* 89 S. Ct. 1, 21 L. Ed. 2d 69 (1968), Justice Stewart ordered Ohio to place George Wallace and his running mate on the general election ballot, emphasizing the relative lack of harm to the State. Justice Marshall followed Justices Powell's and Stewart's analysis in denying relief in *Fishman v. Shaffer,* 429 U.S. 1325 (1976).

These decisions demonstrate that candidates wrongfully denied a reasonable opportunity to qualify for the ballot should have an appropriate and meaningful remedy. When applied to appellant's facts, the criteria established in those cases require that appellants be given an extension of time to gather signatures without the filing fee and magisterial district burdens struck down by the lower court.

The provisions invalidated by the West Virginia Supreme Court of Appeals were clearly unconstitutional.

Under the well-established doctrines of *Bullock v. Carter*, 405 U.S. 134 (1972), and *Lubin v. Panish*, 415 U.S. 709 (1974), a State's insistence on large filing fees from candidates unable to pay violates the equal protection clause. While the magisterial district limitations—that canvassers could not solicit for signatures outside their magisterial district of residence, and that voters could sign certificates only in their districts of residence—presented a novel constitutional question, it is not a difficult one to resolve. To justify those peculiar restrictions, the State proffered only that "localizing the collection process aided in reducing fraudulent and irregular collection procedures, as those collecting signatures are more likely to be familiar with those rendering their signatures and vice versa." *Supplemental Brief of Respondent* at 3, filed with the West Virginia Supreme Court of Appeals. That is, at best, a dubious rationale,[1] and certainly does not rise to the level of being "necessary to serve a compelling state interest," which is the appropriate test for reviewing ballot access restrictions. *Illinois Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). In fact, the magisterial district requirements had little, if anything, to commend their existence and their unconstitutionality is patent.

The burdens created by the invalidated provisions have substantially caused appellants' failure to collect the requisite signatures. For the Socialists, the impact

---

[1] For example, Kanawha County has about 230,000 people living in 5 magisterial districts. WEST VIRGINIA BLUE BOOK 672 (1978). Even a resident could hardly be expected to know most of the approximately forty-five to fifty thousand people who live in any one of those districts. Moreover, the relationship between "familiarity" and reducing fraud is not apparent.

of the filing fees was complete and fatal. Neither the party nor its candidate, appellant Tom Moriarty, could afford the fees. Their declarations of candidacy were therefore rejected by the appellee and they were never able to even begin collecting the necessary signatures. *See* Part I-C, *infra.*

For the Citizens Party, the magisterial district restrictions were devastating.[2] The requirement that canvassers could solicit only in the district in which they lived meant that the party had to recruit volunteers from all over the state to conduct the arduous and time-consuming work of signature gathering. That simply is not feasible for a new political party, like the Citizens. The restriction thus shut out the Citizens from many counties in the State. The requirement that voters can sign a certificate only in their district of residence foreclosed the Citizens from using traditional and effective means of canvassing. Canvassers generally solicit signatures in commercial districts in order to encounter as many voters as possible within a given amount of time. Yet most shoppers do not live in their commercial districts. Solicitation in rural districts, which constitute most of West Virginia, becomes an impossibility when canvassers must spend the greatest portion of their time traveling up and down the state's hollows and back roads. Even in cities, door-to-door solicitation is unworkable—canvassers cannot reach the number of people necessary to be effective. Moreover, the magisterial district restrictions required canvassers and voters to know where the magisterial districts were. As shown by affidavits

---

[2]Of course, the magisterial district provisions were made even more imposing by their combination with § 3-5-23's primary vote forfeiture, which appellants contend is also unconstitutional. *See* Part I-B, *infra.*

submitted to the West Virginia courts, such information was not only *not* a matter of general knowledge, but it was also unavailable in many counties, as maps were either outdated or nonexistent. The combined effect of these facts made signature canvassing a futile undertaking.

The State of West Virginia will not be disadvantaged by granting appellants an extension to solicit signatures. There is still plenty of time for collection and verification of signatures. The major parties' nominating conventions will not even be over until mid-August, and the ballot need not be finalized until at least mid-September. *See, e.g., McCarthy v. Briscoe,* 429 U.S. 1317 (1976) (Powell, J., sitting as Circuit Justice) (Texas ordered on September 30th to include Senator McCarthy on the November ballot); *Williams v. Rhodes,* 89 S. Ct. 1 (1968) (Stewart, J., sitting as Circuit Justice) (Ohio ordered on September 10th to include George Wallace and running mate on its ballot). Moreover, the State can still enforce its goal of maintaining ballot integrity by striking the signature of any voter who voted in the primary. *See American Party of Texas v. White,* 415 U.S. 767, 784 (1974). The State will also be able to realize its interest in keeping candidates off the ballot if they lack a modicum of support within the State. For under the relief sought, appellants will still have to produce the same number of signatures as the legislature has previously required for ballot qualification.

The West Virginia Supreme Court therefore erred in not granting appellants an appropriate remedy to vindicate their constitutional rights.

II.

WEST VIRGINIA CODE § 3-5-23's DISENFRANCHISEMENT FROM THE PRIMARY ELECTION OF THOSE VOTERS WHO SIGN THIRD PARTY NOMINATING CERTIFICATES CREATES AN UNREASONABLE AND UNNECESSARY BURDEN ON APPELLANTS' RIGHTS TO BALLOT ACCESS AND THUS VIOLATES THE FIRST AMENDMENT AND THE EQUAL PROTECTION CLAUSE.

In *American Party of Texas v. White*, 415 U.S. 767, 785-86 (1974), this Court upheld a Texas statute that precluded primary voters from *subsequently* signing nominating petitioners. Such a provision was deemed appropriate and necessary for the State to satisfy its interests in maintaining integrity and purity in the primary and ballot processes. West Virginia's forfeiture provision in § 3-5-23, however, differs from the Texas law in several substantial, and ultimately fatal, ways.

First, and most significantly, the Texas provision invalidated in *American Party* did not disenfranchise signers from voting in any subsequent primaries; it merely foreclosed those who voted in primaries from thereafter signing nominating petitions. The distinction is crucial. West Virginia's procedure requires that voters who sign a petition for a candidate must forego voting in the primary for candidates for *all* partisan offices up for election. Thus, a voter might want to support a Socialist or Libertarian for President, but would be unwilling to lose his vote for nominating a congressman, magistrate, sheriff, etc. That is a severe deprivation in West Virginia, where in many counties one of the major parties is often so dominant that the primaries are tantamount to election for local offices.

This Court has consistently viewed such disenfranchisement schemes with the utmost suspicion. *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Evans v. Cornman*, 398 U.S. 419 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1968); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1968); *Carrington v. Rash*, 380 U.S. 89 (1965). *But see Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973). These decisions evidence that a state may assert a total denial of the franchise only in the narrowest of circumstances: "if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." *Kramer, supra*, 395 U.S. at 627. Since *Carrington* was decided in 1965, only one disenfranchisement scheme has managed to pass that test in this Court. *Salyer Land Co., supra.* The West Virginia primary vote forfeiture is perhaps most akin to the durational residency requirement voided by *Dunn v. Blumstein, supra.* Here, as there, the denial of the franchise in partisan elections is total, although temporary. Here, as there, the deprivation was based upon the exercise of some other constitutional right. In *Dunn*, the right was that of interstate travel; here, it is the right to endorse a candidate for ballot status for a particular office. The operation of the West Virginia statute can be particularly severe because it disqualifies from primary participation those voters who sign nominating certificates of a candidate for even the lowliest county office. Section 3-5-23's disenfranchisement has no justification that can rise to the compelling level. The availability of

alternatives, described below, proves it is not "necessary to promote a compelling state interest."

Second, the Texas procedure in the *American Party* case allowed third parties and independents to collect signatures *after* the primary. That was critical to this Court's decision as it emphasized that third parties could "win ballot position by circulating petitions for signatures for a period of 55 days beginning after the primary and ending 120 days prior to the general election." *American Party of Texas, supra,* 415 U.S. at 784. The post-primary solicitation allows third parties to fulfill their traditional roles in the American political system of joining with Democrats and Republicans who are disenchanted with the major parties and their candidates. *MacBride v. Exon,* 558 F.2d 443, 449 (8th Cir. 1977). *See also Illinois Board of Elections,* 440 U.S. 173, 185-86 (1979); *Williams v. Rhodes,* 393 U.S. 21, 39 (1968) (Douglas, J., concurring). Moreover, the post-primary period is clearly the most effective time for canvassing in a state that makes nomination signing and primary voting mutually exclusive. Before the primary, few voters are willing to forego their primary vote, especially because many voters do not decide until the last minute on selection of a candidate, or on whether to vote or sign a certificate, or on whether they will vote at all. After the primary, canvassers can solicit from those voters who have not voted in the primary. At that point, of course, the signators will not be dissuaded by disenfranchisement in the primary because that election will have already passed.

Third, the appellants' task is made especially difficult by § 3-5-23(e), which, according to the appellee, makes it a crime for anyone to sign a nominating certificate and

then vote in the primary. Voters are going to be far more reluctant to sign a petition knowing that if they later change their minds and decide to vote in a primary, they would not simply be cancelling their petition signatures, but rather, would be subjecting themselves to criminal liability.

Fourth, less restrictive alternatives are available here to satisfy the state's interests. Statutes regulating access to the ballot require the state to demonstrate that its chosen means are "necessary to serve a compelling state interest." *Illinois Board of Elections v. Socialist Workers Party, supra,* 440 U.S. at 184. *Accord, e.g., Storer v. Brown,* 415 U.S. 724, 729 (1974); *Williams, supra,* 393 U.S. at 31. The key language in this standard of review is that the state "may not choose means that *unnecessarily* restrict constitutionally protected liberty." *Illinois Board of Elections, supra,* 440 U.S. at 185 (emphasis supplied); *Kusper v. Pontikes,* 414 U.S. 51, 58-59 (1973). "This requirement is particularly important where restrictions on access to the ballot are involved." *Illinois Board of Elections,* 440 U.S. at 185. *See also Dunn v. Blumstein,* 405 U.S. 330, 343 (1972); Note, *The Less Restrictive Alternative Principle in Constitutional Adjudication,* 27 VAND. L. REV. 971 (1974).

To satisfy its goal of preserving integrity in voting, West Virginia could cancel out on the ballot or machine those offices for which the voter has signed a certificate. To accommodate the administration of this provision, the State could require a moratorium on signature solicitation for a few days preceding the primary.

As another alternative, the state could simply extend the time for collection of signatures for a reasonable period past the primary date to allow third parties to

gather signatures without the blade of disenfranchisement hanging over every petition signer. To enforce integrity under that system, the appellee could strike from nominating petitions those who voted in the primary. In a similar context, the Supreme Court in *Storer v. Brown* suggested such an alternative to the State of California for its exclusivity provision: "It would not appear untenable to permit solicitation of signatures to begin before primary day and finish afterwards." 415 U.S. at 744.

Adoption of a post-primary solicitation period would not be at all problematical for the appellee. Currently, the major party nominating conventions are not over until mid-August and it is quite feasible for a state to begin printing its ballots as late as mid-September. *See, e.g., McCarthy v. Briscoe,* 429 U.S. 1317 (1976) (Powell, J., sitting as Circuit Justice); *Williams v. Rhodes,* 89 S. Ct. 1 (1968) (Stewart, J., sitting as Circuit Justice). *See also* Part I-A, *supra.*

Moreover, the procedure suggested here would be more workable and effective than that provided for in § 3-5-23(c). Presently, third parties and independents must turn in their nominating certificates to the respondent on the day before the primary. W.VA. CODE § 3-5-24. That means West Virginia's County Clerks have about 14 hours—from close of business on election eve to the opening of the polls—to collect the names and precincts of the certificate signers and pull those voters' cards to restrict their voting to nonpartisan races. These efforts are all to be done overnight at a time when the clerks have a whole range of other pressing duties. The suggested alternative could ease this burden on the clerks by allowing a post-primary strike from the nominating

certificates of those voters who participated in the primary.

These alternatives demonstrate both the needlessness and the irrationality of § 3-5-23's basic scheme. Given the above-described intrusiveness of the disenfranchisement provision and the availability of less drastic (and better) means, this Court should hold §§ 3-5-23(c) and -24 to be unconstitutional.

III.

THE § 3-5-23 REQUIREMENT THAT FILING FEES MUST BE PAID BEFORE A THIRD PARTY CAN SOLICIT NOMINATING SIGNATURES CREATES AN UNNECESSARY AND UNREASONABLE BURDEN ON APPELLANTS' RIGHTS OF BALLOT ACCESS.

Appellee has construed § 3-5-23(a) to require filing fees to be paid *before* an independent or third party candidate can begin to canvass for signatures. Thus, for example, the Socialist Workers Party would have had to post $2,500 in fees for its slate of presidential, vice-presidential, and gubernatorial candidates before it could determine voter receptivity. The West Virginia fees are prohibitively high and in combination with the uncertainty of signature gathering they act as a devastating chill on efforts of third parties and independents to seek ballot status.

Although a state may require nonindigents to help offset the costs of administering its election statute, West Virginia's filing fee structure exceeds the bounds of reasonable necessity in achieving that purpose. *See Bullock v. Carter,* 415 U.S. 134, 147 (1972) ("There must be a showing of necessity" to justify ballot access filing fees as a means for relieving the state treasury of election costs). There is no reason why the fees must be

paid in advance of submitting the nominating certificates. There are only meager costs to the state in processing a simple declaration of candidacy. Certainly, the costs would not amount to $2,000 or $500. Whatever substantial costs are incurred arise from the signature verification process. There is ample opportunity to collect fees from an independent or third party candidate when he submits his signatures for ballot qualification. Lower courts have, moreover, invalidated filing fee schemes that are unrelated to the state's actual costs. *E.g., Duncantell v. City of Houston,* 333 F. Supp. 973 (S.D. Tex. 1971).

A state may also require filing fees as a means for preventing "frivolous" candidacies, *Lubin v. Panish,* 415 U.S. 709, 715 (1974), but, again, West Virginia's filing fees system engaged in overkill in attempting to achieve a legitimate goal. Insisting on the filing fee adds nothing; the candidate must still secure signatures from a percentage of registered voters to prove his seriousness. There is, moreover, no necessity for demanding the fee to be paid before signature solicitation because payment of the fee when signatures are submitted would be more than adequate demonstration of the candidate's sincerity. The West Virginia system therefore conflicts with this Court's holding in *Lubin, supra,* 415 U.S. at 716:

> "This legitimate state interest [in preventing frivolous candidates], however, must be achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity."

Furthermore,

> "Filing fees, however large, do not, in and of themselves, test the genuineness of a candidacy or the

> extent of the voter support of an aspirant for public office . . . . [P]rohibitive filing fees . . . can effectively exclude serious candidates."

Applying these guides, the unconstitutionality of West Virginia's filing fee requirements is laid bare. The size and the timing of the assessment are unnecessary. They do not even permit parties to attract supporters, show their strength, and then acquire the necessary financial backing. Moreover, candidates who accumulate the necessary number of signatures have demonstrated their legitimacy and should not be subjected to another barrier.

The filing fees provisions of § 3-5-23 and, through incorporation, § 3-5-8, therefore fail to pass the appropriate level of constitutional scrutiny.

IV.

THE FIRST AMENDMENT VOIDS THE § 3-5-23 REQUIREMENTS THAT CANVASSERS FOR SIGNATURES ON THIRD PARTY NOMINATING CERTIFICATES MUST FIRST RECEIVE CREDENTIALS FROM COUNTY CLERKS AND MUST IDENTIFY THEMSELVES TO EACH VOTER SOLICITED.

A. The Credentials Requirement is an Unconstitutional Licensing Scheme.

Licensing laws for First Amendment activities have, for many years, been in disfavor before this Court: *Lovell v. Griffin,* 303 U.S. 444 (1938); *Hague v. C.I.O.,* 307 U.S. 496 (1939); *Schneider v. State,* 308 U.S. 147 (1939); *Cantwell v. Connecticut,* 310 U.S. 296 (1940); *Largent v. Texas,* 318 U.S. 418 (1943); *Staub v. City of Baxley,* 355 U.S. 313 (1958); *Shuttlesworth v. Birmingham,* 394 U.S. 417 (1969); *Southeastern Productions, Ltd. v. Conrad,* 420 U.S. 546 (1975).

Most recently, the Court in *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976), confronted a local ordinance that forced charitable and political canvassers to identify themselves to the local police before canvassing the citizenry. The Court struck down this scheme on three grounds: (1) the coverage of the ordinance was unclear; (2) the ordinance did not specify what one had to do to properly identify himself to the police; and (3) by its lack of clarity, the ordinance effectively gave the police the discretion to grant or deny permission to canvass. The West Virginia statute suffers from some of these very same infirmities. Section 3-5-23(b) authorizes the clerk to issue credentials to a potential canvasser upon "proper application as herein provided." Unfortunately nowhere in the entire statute is a "proper application" described.

Section 3-5-23(b) does state that, in addition to being a resident of the proper magisterial district, the applicant must also be a "qualified, registered voter." The meaning of "registered" is clear. But what does "qualified" mean? Is this a reference to the same qualifications one must have to register (age, residence, etc.)? Or, if it is not to be redundant, is it a reference to different qualifications?

In either event, what kind of showing of "qualifications" must be made by the canvasser before his application is "proper"? The statute does not tell the canvasser. He is left to guess what a "proper application" is. Accordingly, the statute fails to inform the applicant—with specificity—what it is he must do to obtain credentials.

Not only is the canvasser left to guess, but so is the clerk who administers this statute. The insertion of the words "qualified" and "proper" in the statute indicate

that there are standards by which a potential canvasser's application is to be judged. If there are to be such standards, then they must be so explicit as to make the clerk's task one that lacks any discretion. *See Hynes, supra,* 425 U.S. at 622. Yet § 3-5-23 simply does not "provide explicit standards for those who apply" it. *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972), *cited by Hynes, supra,* at 622.

The clerks have, in fact, used the discretion allowed them by the statute. Affidavits submitted to the West Virginia Supreme Court of Appeals showed that clerks in Marshall and Wood counties, for example, resisted the efforts of potential canvassers to obtain credentials. In one such instance, a clerk refused to allow his aides to give credentials to potential canvassers because the clerk wanted to first "see the people who were being authorized."

Does the statute require the clerk to *see* the applicant? If so, why? Will a paper application do? If a paper application will do, what must it contain? These are questions which no clerk can answer. Thus, the clerks are left to devise their own answers and to decide, on the basis of those answers, whether particular credentials applications should be granted, delayed, or denied. That is just the sort of discretion that this Court, speaking through Chief Justice Burger, found unacceptable in *Hynes*; such discretion has the same "vice condemned in *Lovell, Schneider, Cantwell* and *Staub.*" *Hynes, supra,* 425 U.S. at 622.

The West Virginia statute, then, fails in two overlapping respects when judged by the standards of *Hynes:* first, it offers to the applicant no clear instructions on what he must do, and no clear standards he must meet,

to receive credentials under § 3-5-23; and second, the ambiguities in the statute and the lack of explicit standards by which to judge applications for credentials, leave the administrators of the statute with unacceptable discretion in deciding the question of credentials.

These deficiencies make for a vague statute whose operation threatens important first amendment values. With such values at stake, the *Hynes* decision did not tolerate a speech-restricting law that was not drawn with "narrow specificity." *Hynes, supra,* 425 U.S. at 620, *quoting NAACP v. Button,* 371 U.S. 415, 433 (1963). Similarly, the Court should not now tolerate vagueness of the speech-restricting statute contested here.

In addition to vagueness problems, § 3-5-23(b) suffers from overbreadth. If its purpose is to check the uncontrolled invasion of neighborhoods by unwanted door-to-door canvassers (a purpose alluded to in *Hynes*), then the coverage of the statute is too broad. For, as written, § 3-5-23 includes not only neighborhood canvassers but those who seek signatures in public and commercial areas, as well. To include such canvassers would obviously not serve "orderly-neighborhood" goals. Section 3-5-23 would clearly, then, fail for overbreadth.[3]

If the credentials scheme, in the alternative, is not designed to preserve neighborhood order but to help

---

[3] "Much public expression taking place in the streets and parks creates no danger of conflict with traffic control and public safety and may, therefore, never be subjected to a permit or licensing system. To subject such expression to a permit or licensing system would be to create a classic prior restraint on the transmission of ideas." N. DORSEN, P. BENDER, and B. NEUBORNE, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 286 (1976).

administer the magisterial district requirements of the statute, then § 3-5-23(b) cannot be sustained because forcing certificate bearers to stay within their own magisterial districts has been found unconstitutional by the West Virginia Supreme Court of Appeals.

In any event, the statute would hinder the exercise of what is a pre political activity—the solicitation of support for candidates, parties, and ideas in the public marketplaces of political commerce. This free speech right is the touchstone of all our democratic rights. Without the opportunity of converting the majority to minority viewpoints, third parties are shut off from peaceful, public debate and the democratic process is thwarted.

B. Section 3-5-23 Impermissibly Imposes Upon the Free Speech Anonymity Required by the First Amendment.

Section 3-5-23 requires that door-to-door canvassers and solicitors must identify themselves to the appropriate clerk for purposes of receiving credentials. The statute also requires canvassers to identify themselves to "each voter canvassed or solicited . . . ." Thus the canvasser's identity will be on public record at the clerk's office and will be made known, in a conspicuous way, to each potential signatory.

Justice Brennan, concurring in *Hynes*, has said, "It can hardly be denied that an ordinance requiring the door-to-door campaigner to identify himself discourages free speech," citing *Talley v. California*, 362 U.S. 60 (1960). If that were the case in *Talley* (where a Los Angeles ordinance prohibited the distribution of anonymous handbills), then it would certainly be the case here,

too. Here the canvassers are attempting to challenge the strength of the two established parties. As such, they are bound to come in for their share of abuse from members of the established parties—such as clerks—and perhaps, too, from other who identify them, wrongfully, as proponents of other, unpopular causes. Thus, in Justice Brennan's words,

> "[A]pprehension of reprisal . . . is too often well-founded. The national scene in recent times has regrettable provided many instances of penalties for controversial expression in the form of vindictive harassment, discriminatory law enforcement, executive abuse of administrative powers, and intensive government surveillance." *Hynes, supra,* 425 U.S. at 625-26.

See Buckley v. Valeo, 424 U.S. 1, 71 n.87 (1976). These concerns are especially weighty with the Socialist Workers Party, a group that has long been the object of harassment and abuse. *See, e.g., Paton v. LaPrade,* 524 F.2d 862 (3d Cir. 1975); *Socialist Workers Party v. Attorney General of the United States,* 510 F.2d 253 (2d Cir. 1974); *Wisconsin Social Workers 1976 Campaign Comm. v. McCann,* 433 F. Supp. 540 (E.D. Wis. 1977).

By forcing canvassers to come forth with their identifying credentials each time they approach a voter would unnecessarily highlight the canvasser's name and address. Were there an important governmental interest in highlighting the canvasser's personal identity, then perhaps the chilling effect this requirement has on speech could be justified. Such an interest, however, is lacking.

V.

THE WEST VIRGINIA LEGISLATURE HAS PURPOSEFULLY AND EFFECTIVELY DESIGNED §§ 3-5-8, -23, AND -24 TO KEEP THIRD PARTIES OFF THE BALLOT.

The history of West Virginia's ballot access provisions expose a persistent and illicit intent by the legislature to burden third party access. The relevant statutes have consistently constricted access through amendments passed in response to strong showings by third parties.

The state's initial ballot access legislation permitted a third party to place a candidate on the ballot by submitting signatures of one percent of votes cast for that office in the previous general election, up to a maximum requirement of 1,000. BARNES W.VA. CODE, Ch. 3, Sec. 39. Voters could not sign more than one certificate for the same office but could vote in the primary. There was no criminal enforcement provision.

After the Progressives and Socialists made impressive showings in the 1912 elections, the legislature amended the law by raising the signature requirement to five percent and lifting the 1,000 voter ceiling. 1915 ACTS OF THE LEGISLATURE, Ch. 26, Sec. 23. Primary voters were precluded from signing nominating certificates. The signature solicitation period, however, came after the primary. The law also made those voters who both signed a petition and voted in the primary subject to criminal prosecution.

After a 1923 bill (Acts of the Legis., Ch. 23, Sec. 3) moved the deadline for filing signatures to before the primary, the West Virginia legislature made the final major revision in 1941. Those amendments followed a concerted effort by the Communist Party to get on the

1940 ballot and established the credentials requirement and the magisterial district residency limitations for canvassers and certificate signers.

This legislative combination was, to say the least, effective. As noted in the Statement of Facts, *supra*, only two third party presidential candidates have been on the West Virginia ballot since 1940 and no such candidates for the United States Senate have made it. That record places West Virginia forty-eighth in qualifying third party candidates for the ballot among the forty-eight states that have held federal elections for the past forty years. This Court should analyze these figures in light of the test it stated in *Storer v. Brown*, 415 U.S. 724, 742 (1974), for determining the validity of ballot access restrictions:

> "[C]ould a reasonably diligent independent candidate be expected to satisfy the signature requirement, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot? Past experience will be a helpful, if not always an unerring guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not."

The history of West Virginia's ballot laws and its third parties manifest an illegitimate legislative purpose that has been all too efficient in keeping third parties and independents off the ballot.

Under the decisions of this Court, the State may require a showing of some modicum of support in the state, thus sustaining the one percent provision. The remaining portions of W.Va. Code §§ 3-5-23 and -24, however, must fall because of their unlawful purposes and effects.

THE FEDERAL QUESTIONS ARE IMPORTANT

The issues presented by this appeal implicate two fundamental constitutional liberties—the right to vote and freedom of association, *Williams v. Rhodes*, 393 U.S. 23 (1968)—and go to the very foundation of our democratic system. "For the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . . . *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). 'Other rights, even the most basic, are illusory if the right to vote is undermined,' *Wesberry v. Saunders*, 376 U.S. 1, 17 (1964)." *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 450 (1974). Moreover, "the right to associate with the political party of one's choice is an integral part of our constitutional freedoms." *Id.* at 449. *See also, e.g., Williams v. Rhodes*, 393 U.S. 23 (1968); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960). These rights are most pervasive and important in the context of reviewing ballot access restrictions:

> "[B]y denying the appellants any opportunity to participate in the procedure by which the President is selected, the State has eliminated the basic incentive that all political parties have for conducting such activities, thereby depriving appellants of much of the substance, if not the form, of their protected rights. The right to have one's views considered by the appropriate governmental authority is at the core of the right of political association." *Williams v. Rhodes, supra*, 393 U.S. at 41 (Harlan, J., concurring).

Thus, by overburdening access to the ballot, West Virginia is preempting the rights of the Socialist Workers

and Citizens Parties and their members to spread their messages and effectively compete in the electoral process. Through its restrictive ballot laws, the State also infringes on the rights of voters, such as appellants Paul Becker and Judith Transue, to vote for their candidates and to have a meaningful opportunity to elect them. The franchise for primary elections is at stake for all those West Virginians who, in the future, sign nominating certificates. The entire electorate of West Virginia will have its ballot choices and its government seriously affected by the resolution of this appeal. Because this is a presidential year, the status of West Virginia's ballot will also have interstate political repercussions.

West Virginia's law seriously threatens the vital role traditionally played by third parties. Justice Douglas recognized the importance of third parties in his *Williams v. Rhodes* concurrence:

> "In our political life, third parties are often important channels through which political dissent is aired: 'All political ideas cannot be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, which innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. . . . The absence of such voices would be a symptom of grave illness in our society.' *Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957) (opinion of Warren, C.J.)." 393 U.S. at 39.

West Virginia's legislature, exclusively occupied by Democrats and Republicans, has succeeded in choking off these valuable voices. If this Court permits states to maintain unreasonably restrictive ballot laws, then it would sustain an ominous threat to the potential for

constructive change and to an effective forum for creative political thought.

These concerns are particularly acute in this case because of the points in the system upon which the challenged West Virginia laws apply their pressure. The requirement for the exorbitant filing fees thwarts minor parties and candidates from even making the effort to get on the ballot. The credentials requirement chills many supporters of unpopular causes from becoming involved and working for their candidates. The primary vote forfeiture and the pre-primary filing deadline for signatures mean that third parties cannot complete their traditional (and frequently most significant) role of joining with disenchanted Democrats and Republicans to effect a political force for the general elections. *See MacBride v. Exon*, 558 F.2d 443, 449 (8th Cir. 1977) (striking down a Nebraska statute that required third parties to seek certification prior to the Primary). This combination of pressures exerted by §§ 3-5-23 and -24 essentially stifles most third party movements at their infancy, leaving little opportunity for them to develop a following or to seriously challenge the major party incumbents.

This appeal thus raises questions that involve sensitive individual and political rights, affect large numbers of people in several important ways, and concern the manner in which our democratic system operates. Full review by this Court is therefore warranted.

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction of this appeal, expedite decision on the appellants' request for an extension of time to solicit nominating certificate signatures without prepaying a filing fee, and, after plenary consideration of the other issues during the October, 1980, Term, grant the following relief:

A. In the alternative, (1) declare unconstitutional W.VA. CODE § 3-5-23's forfeiture of the primary voting rights of those voters who sign nominating certificates, or (2) declare unconstitutional the provision of § 3-5-24 that requires nominating certificates and signatures to be submitted before the primary but does not allow for a post-primary signature solicitation period;

B. Declare unconstitutional the requirement in W.VA. CODE § 3-5-23 that filing fees must be paid before solicitation of signatures for nominating certificates can begin;

C. Declare unconsitutional the § 3-5-23 requirement that canvassers must receive credentials from county clerks before soliciting signatures on nominating certificates and must identify themselves to all potential signers.

Respectfully submitted,

ROBERT M. BASTRESS, JR.
P. O. Box 1295
Morgantown, West Virginia 26505
(304) 293-5301
Counsel for Appellants

Of Counsel:

MARGARET WINTER
New York, NY

RICHARD MAYBERRY
Washington, D.C.

CHARLES R. DISALVO
Morgantown, WV

June 13, 1980

APPENDIX A

IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 14863

[Filed: May 22, 1980]

WEST VIRGINIA LIBERTARIAN PARTY, 1980 WEST VIRGINIA SOCIALIST WORKERS CAMPAIGN COMMITTEES, TOM MORIARTY, and JOHN B. ANDERSON AS INTERVENOR,

Petitioners,

v.

A. JAMES MANCHIN, Secretary of State,

Respondent.

Per Curiam:

On the 22nd day of May, 1980, this proceeding in mandamus came on for decision upon the petition of the relators, West Virginia Libertarian Party, 1980 West Virginia Socialist Workers Campaign Committees, and Tom Moriarty; upon the rule issued by this Court on May 6, 1980, made returnable before this Court on May 20, 1980; and upon the petition and motion of John B. Anderson to intervene which was granted by this Court on May 20, 1980; and upon the answer filed on behalf of the respondent, A. James Manchin, Secretary of State; and as well also upon the briefs and oral

arguments of the respective parties made in open court on May 20, 1980.

The Court, upon mature consideration of the matters raised in the petition concerning the constitutionality of certain provisions of W. Va. Code, 3-5-23, and related statutes covering the procedures for nominating third party independent candidates, for reasons to be more fully stated in a written opinion to be hereafter filed, is of opinion that the following provisions of West Virginia Code, 3-5-23, are unconstitutional as the result of a number of decisions of the United States Supreme Court dealing with the Equal Protection Clause and the First Amendment rights of political candidates:

1. The requirement of a filing fee under West Virginia Code, 3-5-8, which is incorporated by reference in West Virginia Code, 3-5-23, insofar as it relates to an indigent candidate.

2. The provision in West Virginia Code, 3-5-23, that limits nominations to those independent candidates who are members of a third party in lieu of permitting an independent candidate who is not affiliated with any party from being eligible for nomination.

3. The requirement in West Virginia Code, 3-5-23, that a person soliciting signatures on behalf of such nominee must be a resident of a magisterial district and can only solicit voters in the magisterial district in which such solicitor is a resident.

As to relator's other claims of unconstitutionality, this Court rejects them, and therefore declines to hold as unconstitutional:

1. That portion of West Virginia Code, 3-5-23, which prohibits persons signing a candidate's certificate from

voting at the primary election held next after the date of signing such certificate.

2. That portion of W. Va. Code, 3-5-23, which requires persons soliciting signatures to obtain credentials.

3. The provision in W. Va. Code, 3-5-24, which requires the certificates to be filed no later than the day preceding the date on which the primary election is held.

It is, therefore, ADJUDGED, ORDERED AND DECREED, that a peremptory writ of mandamus do issue against the respondent, directing him as follows:

1. That the respondent accept on behalf of those petitions in this case who are financially unable to pay a filing fee, as demonstrated by an affidavit of indigency, such affidavit in lieu of the filing fee.

2. As to the petitioner, John B. Anderson, that he be permitted to amend his declaration prior to the general election, in the event he qualifies for said general election, to show that he is an independent candidate and not a member of any political party and to so appear on the general election ballot.

3. As to the certificates of the relators herein, including the intervenor, John B. Anderson, that the voters who sign the same need not be residents of the same magisterial district as that of the person who has solicited their signatures.

ADJUDGED, ORDERED AND DECREED, that the service of an attested copy of this Order upon the respondent shall have the same effect as the service of a formal writ of mandamus.

Justice McGraw would dispose of the case differently, saying first that filing fees are impermissible as a qualification for candidacy under the Constitution of the State. Justice McGraw is further of the opinion that the Federal and State Constitutions, in their Equal Protection Clauses, forbid a State election law which operates to confer special privilege or advantage upon any association, candidate or partisan. Every qualified voter is entitled to participate at every step of the electoral process. This right is not restricted to those professing partisan affiliation. The Independent voter has the same constitutional right to cast his ballot for Independent candidates of his choice, in the same election, and upon the same terms and conditions, as does a partisan voter.

The Election Law, embodied in Chapter 3 of the West Virginia Code, can be applied to enable the Independent voter to participate in the primary election on June 3, 1980. The respondent should be directed to specify ballots in blank for use by the Independent voter at his polling place. The Independent voter could write thereon his vote, which would then be tabulated by the election officials and all candidates receiving the requisite percentage of votes necessary to qualify should be certified to the November general election ballot for consideration by all qualified voters.

Entered May 22, 1980.

APPENDIX B

IN THE
SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA

No. 14863

WEST VIRGINIA LIBERTARIAN PARTY, *et al.*,
Petitioners,

v.

A. JAMES MANCHIN,
Respondent.

NOTICE OF APPEAL

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE
UNITED STATES

Notice is hereby given that petitioners 1980 West Virginia Socialist Workers Campaign Committee, Tom Moriarty, Citizens Party, Barry Commoner, LaDonna Harris, Paul Becker, and Judith Transue hereby appeal to the United States Supreme Court from the denials of relief in the May 22, 1980, final order of the West Virginia Supreme Court of Appeals and from its May 27, 1980, denial of petitioners' Motion to Amend the Order.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ Robert M. Bastress, Jr.
Counsel for Appellants

CERTIFICATE OF SERVICE

I, Robert M. Bastress, Jr., certify that I have served copies of the foregoing Notice of Appeal upon the Respondent by mailing a copy to his Counsel, Chauncey H. Browning, Attorney General, and Larry R. Frail, Assistant Attorney General, and upon Intervenor John Anderson by mailing a copy to his Counsel, William Robertson, Washington, D.C., this 2nd day of June, 1980.

/s/ Robert M. Bastress, Jr.

Filed: June 4, 1980

APPENDIX C

STATUTES

WEST VIRGINIA CODE, § 3-5-8

§ 3-5-8. Filing fees and their disposition.

Every person who becomes a candidate for nomination for election to office in any primary election, shall, at the time of filing the certificate of announcement as required in this article, pay a filing fee as follows:

(a) A candidate for president of the United States, for vice-president of the United States, for United States senator, for member of the United States house of representatives, for governor and for all other state elective officers shall pay a fee equivalent to one percent of the annual salary of the office for which the candidate announces;

(b) A candidate for the office of judge of a circuit court and judge of any court of record of limited jurisdiction shall pay a fee equivalent to one percent of the total annual salary of the office paid from any and all sources for which the candidate announces;

(c) A candidate for member of the house of delegates shall pay a fee of thirty-three dollars, and a candidate for state senator shall pay a fee of sixty-six dollars;

(d) A candidate for sheriff, prosecuting attorney, circuit clerk, county clerk, assessor, member of the county court and member of the county board of education shall pay a fee equivalent to one percent of the annual salary of the office for which the candidate announces: Provided, that the fee in no case shall be less than five dollars. A candidate for any other county office shall pay a fee of five dollars;

(e) A candidate for justice of the peace in districts having a population of five thousand or less shall pay a fee of ten dollars; in districts having a population of more than five thousand and not more than twenty-five thousand, fifteen dollars; and in districts having more than twenty-five thousand population, each candidate shall pay a fee of twenty-five dollars;

(f) A candidate for constable in districts having a population of five thousand or less shall pay a fee of five dollars; in districts having a population of more than five thousand and not more than twenty-five thousand, ten dollars; and in all other districts fifteen dollars;

(g) Delegates to the national convention of any political party shall pay the following filing fees:

A candidate for delegate-at-large shall pay a fee of twenty dollars; and a candidate for delegate from a congressional district shall pay a fee of ten dollars;

(h) Candidates for members of political executive committees and other political committees shall pay the following filing fees:

A candidate for member of a state executive committee of any political party shall pay a fee of ten dollars; a candidate for member of a county executive committee of any political party shall pay a fee of one dollar; and a candidate for member of a congressional, senatorial or delegate district committee of any political party shall pay a fee of one dollar.

Candidates filing for an office to be filled by the voters of one county shall pay the filing fee to the clerk of the circuit court, and candidates filing for an office to be filled by the voters of more than one county shall pay the filing fee to the secretary of state at the time of filing

their certificates of announcement, and no certificate of announcement shall be received until the filing fee is paid.

All moneys received by such clerk from such fees shall be credited to the general county fund. Moneys received by the secretary of state from fees paid by candidates for offices to be filled by all the voters of the State shall be deposited in a special fund for that purpose and shall be apportioned and paid by him to the several counties on the basis of population, and that received from candidates from a district or judicial circuit of more than one county shall be apportioned to the counties comprising the district or judicial circuit in like manner. When such moneys are received by sheriffs, it shall be credited to the general county fund. (1937, c. 35; 1943, c. 48; 1951, c. 86; 1963, c. 64; 1964, 1st Ex. Sess., c. 2; 1972, c. 51.)

WEST VIRGINIA CODE, § 3-5-23

§ 3-5-23. Certificate nominations; requirements and control; penalties.

(a) Groups of citizens having no party organization may nominate candidates for public office otherwise than by conventions or primary elections. In such case, the candidate or candidates, jointly or severally, shall file a declaration containing the name of the political party he or they propose to represent, its platform, principles or purposes, with the secretary of state if the office is to be filled by the voters of more than one county, or with the clerk of the circuit court of the county if the office is to be filled by the voters of one county or political subdivision thereof; such declaration to be filed at least

thirty days prior to the time of filing the certificate provided by section twenty-four [§ 3-5-24] of this article, and at the time of filing of such declaration each candidate shall pay the filing fee required by law, and if such declaration is not so filed or the filing fee so paid the certificate shall not be received by the secretary of state, or clerk of the circuit court, as the case may be;

(b) The person or persons soliciting or canvassing signatures of duly qualified voters on such certificate or certificates, shall be residents and qualified, registered voters, of the magisterial district of the county in which such solicitation or canvassing is made, and may solicit or canvass duly registered voters resident within their own respective magisterial district, but must first obtain from the clerk of the county court of which such canvasser or solicitor is a resident, credentials which must be exhibited to each voter canvassed or solicited, which credentials may be in the following form or effect:

State of West Virginia, County of _____, ss:

This certifies that _____, a duly registered voter of Precinct No. _____ District, of this county and State; whose post-office address is _____, is hereby authorized to solicit and canvass duly registered voters residing in _____ District of this county to sign a certificate purporting to nominate _____ (here place name of candidate heading list on certificate) for the office of _____ and others, to represent the _____ Party at the general election to be held on _____, 19____.

Given under my hand and the seal of my office this _____ day of _____, 19____.

_____

Clerk, County Court of

_____ County.

The clerk of each county court, upon proper application made as herein provided, shall issue such credentials and shall keep a record thereof;

(c) The certificate shall be personally signed by duly registered voters, in their own proper handwriting or by their marks duly witnessed, who must be residents within the magisterial district of the county wherein such canvass or solicitation is made by the person or persons duly authorized. Such signatures need not all be on one certificate. The number of such signatures shall be equal to not less than one percent of the entire vote cast at the last preceding general election for the office in the State, district, county or other political division for which the nomination is to be made, but in no event shall the number be less than twenty-five. Where two or more nominations may be made for the same office, the total of the votes cast at the last preceding general election for the candidates receiving the highest number of votes on each ticket for such office shall constitute the entire vote. No signature on such certificate shall be counted unless it be that of a duly registered voter of a precinct within the magisterial district wherein such certificate was presented. No person signing such certificate shall vote at any primary election to be held to nominate candidates for office to be voted for at the election to be held next after the date of signing such certificate;

(d) Such certificates shall state the name and residence of each of such candidates; that he is legally qualified to hold such office; that the subscribers are legally qualified and duly registered as voters and desire to vote for such candidates; and shall designate, by not more than five words, a brief name of the party which such candidates represent and may adopt a device or emblem to be printed on the official ballot. All candidates nominated by the signing of such certificates shall have their names placed on the official ballot as candidates, as if otherwise nominated under the provisions of this chapter. At the top of each certificate shall be the following form or to the following effect:

State of West Virginia, County of _____, ss:

This is to certify that we, the undersigned, are duly registered voters, resident within the magisterial district of _____, County of _____, State of West Virginia, and do hereby make the following nominations for public office, to-wit:

For House of Delegates

A _____ B _____,

Residence _____

(And so on for each nomination so made)

And, we further certify that each of said candidates is legally qualified to hold the office for which he is nominated; that we are legally registered and qualified voters and desire to vote for said candidates and acknolwedge that we are aware that no person signing this certificate can legally vote at the primary election next ensuing after the date of filing of this certificate. The name of the party which the candidates represent is (here state name)

and the device or emblem of the party is (here affix device).

Signature	Precinct No.	Residence	Postoffice Address
(Names of Voters)	(Number of precinct in magisterial district	(Describe it)	(Name of office)

(e) The secretary of state, or the clerk of the circuit court, as the case may be, may investigate the validity of such certificates and the signatures thereon, and if upon such investigation there may be doubt as to the legitimacy and the validity of such certificate, he may request the attorney general of the State, or the prosecuting attorney of the county, to institute a quo warranto proceeding against the nominee or nominees by certificate to determine his or their right to such nomination to public office, and upon request being made, the attorney general or prosecuting attorney shall institute such quo warranto proceeding; and

(f) Any person violating the provisions hereof, in addition to penalties prescribed elsewhere for violations of this chapter, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not more than one thousand dollars, or confined in the county jail for not more than one year, or both, in the discretion of the court. (1915, c. 26; 1916, 3rd Ex. Sess., c. 5; 1919, c. 78, § 23; Code 1923, c. 3, § 26a(3), (23); 19141, c. 40; 1963, c. 64.)

WEST VIRGINIA CODE, § 3-5-24

§ 3-5-24. Filing of nomination certificates; time.

All certificates nominating candidates for office under the preceding section [§ 3-5-23], including a candidate for the office of presidential elector, shall be filed, in the case of a candidate to be voted for by the voters of the entire State or by any subdivision thereof other than a single county, with the secretary of state, and in the case of all candidates for county and magisterial district offices, including all offices to be filled by the voters of a single county, with the clerk of the circuit court of the county, not later than the day preceding the date on which the primary election is held. After such date no such certificate shall be received by such officers. (1915, c. 26; 1916, 3rd Ex. Sess., c. 5; 1919, c. 78; Code 1923, c. 3, § 26a(23); 1963, c. 64.)

79-1989

Supreme Court, U.S.
FILED
SEP 8 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CITIZENS PARTY, et al.,

Appellants,

v.

A. JAMES MANCHIN,
Secretary of State of
West Virginia,

Appellee.

MOTION TO DISMISS

CHAUNCEY H. BROWNING
Attorney General

GREGORY W. BAILEY
Deputy Attorney
General

LAWRENCE R. FRAIL
Assistant Attorney
General

COUNSEL FOR APPELLEE

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CITIZENS PARTY, et al.,

Appellants,

v.

A. JAMES MANCHIN,
Secretary of State of
West Virginia,

Appellee.

MOTION TO DISMISS

CHAUNCEY H. BROWNING
Attorney General

GREGORY W. BAILEY
Deputy Attorney
General

LAWRENCE R. FRAIL
Assistant Attorney
General

COUNSEL FOR APPELLEE

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CITIZENS PARTY, et al.,

Appellants,

v.

A. JAMES MANCHIN,
Secretary of State of
West Virginia,

Appellee.

MOTION TO DISMISS

Comes now the appellee, A. James Manchin, Secretary of State of the State of West Virginia, by counsel, and moves that the above-styled action be dismissed for the following reasons:

I.

APPELLANTS SHOULD NOT BE GRANTED AUTOMATIC BALLOT ACCESS IN WEST VIRGINIA WITHOUT A SHOWING OF POPULAR SUPPORT.

As was discussed in Appellee's Motion in Opposition to Appellant's Motion to Expedite and for Emergency Relief, it is clear that appellants have not acted in good faith in the course of this litigation. The record in this case, from its very inception in Kanawha County Circuit Court (wherein injunctive relief was denied the West Virginia Libertarian Party, in part on the basis of the doctrine of laches), reflects an utter absence of meaningful effort by appellants to accomplish ballot access under and within the laws of the State of West Virginia as they pertain to elections. Rather, a pattern of "trial by ambush" and consecutive bids for extraordinary relief, have characterized the appellants' course in this matter. (See, Appellee's Motion in Opposition to Issuance of Writ of Injunction.)

Indeed, if the appellants had taken action to attempt to comply with the law before and after the changes therein as instituted by the West Virginia Supreme Court of Appeals by its order of May 22, 1980, appellee contends that appellants could have appeared on the ballot in West Virginia. As is shown by the access to the West Virginia ballot as attained by the West Virginia Libertarian Party Candidates and John Anderson, the requirements in this State were not and are not now insurmountable, nor unduly burdensome so as to deny ballot access to independent or third party candidates. The failure of appellants to attain ballot access is born of their own inaction and it would be most

unfortunate to simply hand over ballot access to persons who exerted no effort to make any showing of public support. Indeed, such automatic placement would be the only conceivably workable method of granting relief to appellants at this late date.

However, even such placement on the ballot by order of this Court would be, as a practical matter, unworkable and burdensome to the State. The primaries are long past, the candidacies at this time have been firmly established, and the campaign season is rapidly drawing to its conclusion. To alter and refashion the ballots at this time would be a monumental and confused undertaking. The appellee requests that this Court recognize the impracticalities involved in granting appellants' last minute demands and thus requests that the relief sought by appellants be denied.

II.

THE FORFEITURE OF NOMINATING CERTIFICATE SIGNER'S VOTE IN THE PRIMARY IS CONSTITUTIONALLY PERMISSIBLE.

This Honorable Court has addressed this issue, saying:

> "[W]e have no doubt about the validity of disqualifying from signing an independent candidate's petition all those registered voters who

> voted in a partisan ballot in the primary, although they did not vote for the office sought by the independent. * * *" (Emphasis supplied.) Storer v. Brown, 415 U.S. 724 at 740-741, 39 L. Ed. 2d 714, 94 S. Ct. 1274 (1974).

The West Virginia Supreme Court of Appeals has clearly upheld the provision that primary voters are precluded from signing a nominating certificate. In State ex rel. Daily Gazette Co. v. Bailey, 152 W. Va. 521, 164 S.E.2d 414 (1968), it was held that such a signing amounts to a vote by ballot:

> "[O]ne who signs such certificate is precluded from casting a further vote in the primary election." 164 S.E.2d at 418.

In American Party of Texas v. White, 415 U.S. 767, 39 L. Ed. 2d 744, 94 S. Ct. 1296 (1974), this Honorable Court clearly held that a state is not constitutionally bound to allow a voter to vote in a party primary and to sign a nominating petition of another party. 415 U.S. at 785. The distinctions drawn by appellants between White and the instant situation are hardly compelling. The appellants in White could indeed collect signatures before and after the primary election. However, the requirements under the Texas law discussed in White, namely, the requirements of signatures equal to three to five percent

of the last vote cast, must be contrasted to the West Virginia requirement of gathering signatures equal to only one percent of the vote cast in the last election. Gathering such a tiny percentage of signatures in West Virginia prior to the primary election would hardly be a Herculean task if petitioners had made any meaningful effort at all to collect such signatures. There is nothing in the record to suggest that appellants could not have met such a requirement.

Additionally, as a practical matter, voters who had signed appellants' certificates could not be prevented from again voting for the office for which such signatures had been offered, once they enter a voting machine. Therefore, in order to uphold the integrity of the balloting process, the law as it is presently framed must be upheld.

III.

WEST VIRGINIA'S FILING FEE SYSTEM FOR POLITICAL CANDIDATES PROMOTES A VARIETY OF STATE INTERESTS, AND IS THEREFORE CONSTITUTIONALLY SOUND.

This Honorable Court observed as follows in Lubin v. Panish, 415 U.S. 709, 39 L. Ed. 2d 702, 94 S. Ct. 1315 (1974):

"In Bullock v Carter, 405 US 134, 31 L Ed 2d 92, 92

S Ct 840 (1972), we recognized that the State's interest in keeping its ballots within manageable, understandable limits is of the highest order. Id., at 144-145, 31 L Ed 2d 92. The role of the primary election process in California is underscored by its importance as a component of the total electoral process and its special function to assure that fragmentation of voter choice is minimized. That function is served, not frustrated, by a procedure that tends to regulate the filing of frivolous candidates. A procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the candidate's desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence would tend to impede the electoral process. That no device can be conjured to eliminate every frivolous candidacy does not undermine the state's effort to eliminate as many such as possible.

"That 'laundry list' ballots discourage voter participation and confuse and frustrate those who do

> participate is too obvious to call for extended discussion. The means of testing the seriousness of a given candidacy may be open to debate; the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support is not. Rational results within the framework of our system are not likely to be reached if the ballot for a single office must list a dozen or more aspirants who are relatively unknown or have no prospects of success." 415 U.S. at 715, 716.

Obviously, there are numerous legitimate reasons for limiting the size of the ballot, and for restricting access thereto.

Appellants apparently argue the evils of the very existence of a fee system, regardless of its application. In this regard, appellants rely on cases which apply to indigent candidates. However, the West Virginia Supreme Court of Appeals, in its order of May 22, 1980, struck down the filing fee as it applies to indigents. Thus, appellants apparently are simply unhappy about having to pay the fees, period, and are proceeding on the notion that the fee system in West Virginia is patently unconstitutional as to all candidates.

The appellee argues that such fees are not unconstitutional, but are rationally related to the furtherance of the State's interest in ballot regulation, assuring that the winner is the choice of at least a strong plurality of voters while avoiding run-off elections, limiting the ballot to serious candidates and defraying expenses. Indeed, since Lubin, supra, the validity of filing fees has been robustly upheld. Fees of up to five percent of the annual salary of the office sought have found approval in Adams v. Askew, 511 F.2d 700 (5th Cir. 1975). Adams provides an excellent discussion of the vitality of filing fees, and holds that voters' rights are not infringed where a candidate chooses not to run because he is unwilling to comply with reasonable state requirements. The State alleges that such a deliberate refusal is at issue herein. Adams further holds that, unlike the rights of voters, the right of candidacy is not accorded a fundamental status for purpose of equal protection analysis of restrictions thereon.

Indeed, appellee observes that this Honorable Court has shifted from time to time in its requirement as to the level of analysis to be applied to these cases. The appellee urges that the payment of fees in order to secure one's candidacy need not be viewed in terms of "compelling state interest," but that even if it is so viewed herein, the appellee believes that its interests are sufficiently compelling, particularly

in view of the inaction and deliberate defiance of the appellants herein, to withstand such scrutiny. The appellants have given this Court no reasons requiring that they be treated differently from other office seekers as to the payment and filing of fees. Nor do they offer any evidence of harm coming to them on the basis of the West Virginia requirement that said fees be paid before canvassing begins. If the candidate can afford the fees, he should be required to pay them at the outset to offset administrative costs attendant to elections. At any rate, the order in which such payment is made by nonindigents is surely a matter which goes beyond the proper scope of review herein. It is a nonconstitutional "housekeeping" matter.

IV.

THE REQUIREMENT THAT CANVASSERS MUST SECURE CREDENTIALS BEFORE SOLICITING CERTIFICATE SIGNATURES IS NOT AN UNCONSTITUTIONAL LICENSING SCHEME.

That canvassers must secure credentials in order to solicit certificate signatures is utterly valid and essential to assure that fraud and irregularities do not occur in the collecting of names to promote ballot placement. Appellants would have this Court permit supporters of independent candidates to anonymously stalk about collecting signatures. The persons approached deserve to know who

the canvasser is and whom he or she actually represents. This can best be accomplished by providing the canvasser with credentials indicating his or her identity and function. Of course, the potential for irregularities is greatly diminished when there exists a record of where the signatures turned in are coming from.

No great burden is placed on canvassers by having to enter the county clerk's office and applying for credentials. There is, of course, no charge therefor, and credentials are readily afforded upon application therefor.

The appellee notes that in the limited scope of the cases in this area, no statutory provision such as that complained of has been directly addressed. The State takes the posture that the cases cited by appellants are as a whole actually supportive of the State's position, particularly Hynes v. Mayor of Oradell, 425 U.S. 610, 48 L. Ed. 2d 243, 96 S. Ct. 1755 (1976). The provision complained of herein has the valid purposes of protecting the public and the electoral process, and is not simply designed to compel disclosure of the identity of canvassers. The concern about retaining canvassers' anonymity surely cannot overcome the genuine need for disclosure by those soliciting signatures.

CONCLUSION

The appellee would remind this Court that there is always to be found, if one searches sufficiently long and hard for it, a less restrictive or burdensome alternative. Rather, the analysis should focus on whether one exercising reasonable diligence can appear on the ballot. Storer v. Brown, supra. The appellee believes that no candidate making such a reasonable effort to accumulate signatures and funds need be eliminated from the ballot under current West Virginia law. The United States Supreme Court in Mandel v. Bradley, 432 U.S. 173, 53 L. Ed. 2d 199, 97 S. Ct. 2238 (1977), looked to factual and practical considerations in reviewing ballot access requirements. This Court is requested to do the same now.

Additionally, appellee respectfully submits that the provisions of the West Virginia Code attacked herein need not and should not be declared unconstitutional on the basis of the outcries of the appellants, political groups who have failed to ignite the public's imagination, and therefore in desperation seek last-minute action by this Court in order to secure their places on the ballot.

Respectfully submitted,

A. JAMES MANCHIN,
Secretary of State

By Counsel

CHAUNCEY H. BROWNING
Attorney General

GREGORY W. BAILEY
Deputy Attorney General

LAWRENCE R. FRAIL
Assistant Attorney General
State Capitol, Room 26-E
Charleston, West Virginia 25305

Counsel for Appellee

CERTIFICATE OF SERVICE

I, Gregory W. Bailey, one of counsel for the appellee and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 9TH day of October, 1980, I served three (3) copies of the foregoing Motion to Dismiss on the appellants by depositing same in a United States mailbox, with postage prepaid, addressed to counsel of record for the appellants Robert M. Bastress, Box 1295, Morgantown, West Virginia 26505. I further certify that all parties required to be served have been served.

Gregory W. Bailey

GREGORY W. BAILEY